



COURT OF APPEALS OF INDIANA
ORAL ARGUMENT AT A GLANCE
IU SOUTHEAST — NEW ALBANY

Thomas Donovan v. Grand Victoria Casino & Resort

Appeal from:
Marion Superior Court,
The Honorable
Robyn L. Moberly, Judge

Oral Argument:
Wednesday, October 14, 2009
1:30 p.m.
20 minutes each side

CIVIL LAW ISSUE

Today we will be discussing whether Thomas Donovan possesses a contract right to play blackjack at Grand Victoria Casino & Resort and whether he has a common law right of access to the casino premises.

CASE SYNOPSIS

Facts and Procedural History

Thomas Donovan plays blackjack as his vocation. He is a self-described “advantage player” who taught himself to count cards through using an internet website. Donovan and Patrick Banfield, the former blackjack pit boss for Grand Victoria Casino & Resort, L.P., had allegedly agreed (through a third-party and fellow card-counter) that Donovan could play blackjack at Grand Victoria if he wagered no more than \$25 per hand. In June of 2006, Sonny Duquette replaced Banfield. Donovan continued

to play blackjack from June until August, when he was barred from the blackjack tables but offered other games. Donovan refused to play games other than blackjack, and the casino excluded him.

On September 14, 2007, Donovan filed a complaint for damages alleging that Grand Victoria breached the terms of an implied-in-fact contract. He also sought an injunction, specifically, an order that Grand Victoria allow him access to Grand Victoria’s riverboat to play blackjack. Grand Victoria moved for summary judgment,

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CASE SYNOPSIS

and the trial court granted that motion. Donovan appealed.

Summary of Arguments

Donovan has alleged that an implied-in-fact contract was formed when Grand Victoria's former blackjack pit boss permitted him to play blackjack there. He contends that Grand Victoria breached this contract by later excluding him from blackjack. Grand Victoria responds that the prior blackjack play consisted of a series of individual offers made by Grand Victoria and accepted by Donovan on a hand-by-hand basis. Each completed hand fulfilled the respective obligations of the parties. According to Grand Victoria, there can be no implied-in-fact contract providing for future play, because Donovan is not contractually obligated to play blackjack at Grand Victoria and a contract is not formed absent mutuality of obligation.

Donovan also claims that he has a liberty interest in pursuing the vocation of his choice and that he has a common-law right of reasonable access to premises open for public activity, particularly when the activity is subject to exhaustive state regulations. Grand Victoria responds with the argument that an Indiana privately-owned amusement entity may exclude a patron from its premises for any reason or none, i.e., it need not identify illegal conduct. [Card-counting is not illegal.] Essentially, Grand Victoria contends that there exists a common law right of exclusion.

Glossary:

Card Counter: A card counter is a blackjack player who keeps track of the playing cards as they are dealt and adjusts his betting patterns when the odds are in his favor.

Blackjack: an ace and second card with a point value of ten dealt as the initial two cards to a player or the dealer.

Summary Judgment: Pursuant to Indiana Trial Rule 56(C), a trial court may grant judgment without a trial when the designated evidence "shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Contract Implied-in-Fact: a contract that arises out of acts and conduct of the parties, coupled with a meeting of the minds and a clear intent of the parties in the agreement.

Injunction: A court order commanding or preventing an action.

Benefit-of-the-bargain Damages: Damages that a breaching party to a contract must pay to the aggrieved party, equal to the amounts that the aggrieved party would have received, including profits, if the contract had been fully performed.

Mutuality of Obligation: The agreement of both parties to a contract to be bound in some way.

TODAY'S PANEL OF JUDGES

Hon. Edward W. Najam, Jr. (Monroe County) Presiding

- Judge of the Court of Appeals since December 1992

Edward W. Najam, Jr. graduated from the Indiana University High School in Bloomington, where he was raised and still resides. He received his B.A. in political science, with highest distinction, from Indiana University, and his law degree from the Harvard Law School. As an undergraduate he was elected Student Body President, elected to Phi Beta Kappa, and received the Herman B Wells Senior Recognition Award for academic excellence and campus leadership.

After law school, Judge Najam returned to Bloomington and served as Administrative Assistant to Mayor Frank McCloskey for two years. For the next 18 years, Judge Najam maintained a general civil and trial practice. During that time he served on attorney advisory committees to the United States District Court for the Southern District of Indiana, was a member of the Bloomington Rotary Club, and was a Director and President of the Monroe County YMCA. Governor Evan Bayh appointed him to the Court of Appeals in 1992, and he was retained by the electorate in 1996 and 2006. Since joining the Court, Judge Najam has served on the Indiana Supreme Court Rules Committee and the Supreme Court Judicial Technology and Automation Committee, and he represents the Indiana judiciary on the Indiana Department of Homeland Security Counter-Terrorism

and Security Council. In 2001, Judge Najam co-chaired the first national conference on the institutional role of state intermediate appellate courts, which was attended by judges from twenty-two states.

Judge Najam is the author of "Public School Finance in Indiana: A Critique," published in the Indiana Law Journal, and "Caught in the Middle: The Role of State Intermediate Appellate Courts," published in the Indiana Law Review. As chair of the Appellate Practice Section of the Indiana State Bar Association, Judge Najam initiated "the appellate rules project" that culminated in a complete revision of the Indiana Rules of Appellate Procedure. Judge Najam was a member of the first class of the Indiana Graduate Program For Judges in 1997. He lectures on appellate practice and has recently taught seminars on the rules for the admission of scientific evidence and litigation in public health emergencies. Judge Najam is a member of the American, Indiana, and Monroe County Bar Associations and the ABA Appellate Judges Conference, is a member of the Indiana University School of Law-Bloomington Board of Visitors, is a member of Phi Delta Phi Legal Fraternity, is a Fellow of the American, Indiana, and Indianapolis Bar Foundations, and is an Eagle Scout.

TODAY'S PANEL OF JUDGES

Hon. James S. Kirsch (Marion County),

- Judge of the Court of Appeals since March 1994

James S. Kirsch was appointed to the Court of Appeals in March 1994. He served as Chief Judge from March 2004 to February 2007. A native of Indianapolis, Judge Kirsch is a graduate of the Indiana University School of Law at Indianapolis (J.D., cum laude, 1974) and Butler University (B.A. with honors, 1968).

He served as Judge of the Marion Superior Court from 1988 to 1994 and as presiding judge of the court in 1992. From 1974 to 1988, he practiced law with the firm of Kroger, Gardis & Regas in Indianapolis in the areas of commercial and business litigation and served as managing partner of the firm. Since 1990, he has held an appointment as Visiting Professor of Law and Management at the Krannert Graduate School of Management at Purdue University.

Judge Kirsch is a past-president of the Indianapolis Bar Association and of the Indianapolis Bar Foundation and a former member of the Board of Visitors of the Indiana University School of Law-Indianapolis. He is a past-president of the

United Way/Community Service Council Board of Directors and a current or former member of the Board of Directors of the United Way of Central Indiana, the Board of Associates of Rose Hulman Institute of Technology, and of the Boards of Directors of the Goodwill Industries Foundation of Central Indiana, Community Centers of Indianapolis, the Indianapolis Urban League, the Legal Aid Society of Indianapolis, and the Stanley K. Lacy Leadership Association. He is a Fellow of the Indiana State Bar Foundation and of the Indianapolis Bar Foundation. He is a frequent speaker and lecturer and has served on the faculty of more than 200 continuing legal education programs. He has been named a Sagamore of the Wabash by four different governors.

Judge Kirsch and his wife Jan have two children, Adam and Alexandra. Judge Kirsch was retained on the Court in 2006 and stands again for retention in the 2016 fall election.

“Appeals on Wheels”

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

The Court of Appeals has held over 250 "on the road" cases since early 2000.

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. L. Mark Bailey (Decatur County)

- Judge of the Court of Appeals since January 1998

L. Mark Bailey was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in January of 1998 and was retained by election in 2000. Born in Decatur County, Judge Bailey was raised on the family farm homesteaded by his ancestors over 150 years ago. He earned his B.A. from the University of Indianapolis; his J.D. from Indiana University School of Law at Indianapolis; and his M.B.A. from Indiana Wesleyan University.

Before his appointment, Judge Bailey was a trial court judge, an administrative law judge, and a practicing attorney. During his legal career, Judge Bailey has served public interest and professional organizations in various capacities. He chaired the Local Coordinating Council of the Governor's Task Force for a Drug-Free Indiana and the Judicial Conference Alternative Dispute Resolution Committee. Additionally, he served on the Board of Managers of the Indiana Judges Association and the Judicial Ethics Committee of the Indiana Judicial Center. He is also a certified civil mediator.

Judge Bailey was also the first Chairperson of the Indiana Pro Bono Commission, having been awarded the Indiana Bar Foundation's Pro Bono Publico Award and the 2002 Randall Shepard Award for his pro bono contributions. In 2004, Judge Bailey and his

First District colleagues received the Indiana Bar Foundation Law-Related Education Award for their commitment to bringing oral arguments into community settings. In February of 2006, he served as the Distinguished Jurist in Residence at Stetson University College of Law, and in 2007-08, he was the Moderator of the Indianapolis Bar Association's Bar Leader Series. Currently, Judge Bailey is a member of the Supreme Court Committee on Rules of Practice and Procedure and the Judicial Education Committee of the Judicial Conference of Indiana; he again serves on the Board of Managers of the Indiana Judges Association, now as the Appellate District member.

A strong supporter of law-related education, Judge Bailey teaches government classes at the University of Indianapolis. He is also a frequent presenter at Indiana Continuing Legal Education seminars, and he regularly volunteers to judge law school trial advocacy and moot court competitions and to teach National Institute of Trial Advocacy programs. He and his wife have two children.

ATTORNEYS FOR THE PARTIES



For Appellant, Thomas Donovan:

Marc S. Sedwick
Sedwick Law Firm, P.C.
Indianapolis

Marc S. Sedwick graduated from Indiana University—Bloomington with degrees in Economics and Political Science. He attended law school in the evening at the Indiana University School of Law—Indianapolis while working full-time as an environmental/toxic tort claims adjuster for a large insurance company. Mr. Sedwick was admitted to the Indiana Bar in 2002 and the Kentucky Bar in 2003. He focuses on plaintiff civil litigation

throughout the states of Indiana and Kentucky.

Mr. Sedwick is on the Board of Directors with the Indiana Trial Lawyers Association. He is also a member of the American Association of Justice (AAJ), as well as the Indiana, Kentucky, and Indianapolis Bar Associations. Mr. Sedwick is a graduate of the AAJ Trial Advocacy College, Essentials of Civil Litigation, Tuscaloosa, Alabama (2005).

For Appellee, Grand Victoria Casino & Resort:

J. Patrick Schomaker
Smith, Rofles & Skavadahl Co., L.P.A.
Cincinnati, Ohio

Patrick Schomaker is from Cincinnati, Ohio and is licensed to practice law before the State and Federal Courts in Indiana, Ohio and Kentucky. A graduate of the Salmon P. Chase College of Law at Northern Kentucky University, his areas of practice include general litigation, insurance coverage, and insurance litigation. Mr. Schomaker obtained a Bachelor of Arts degree from Xavier University in 2000.

Mr. Schomaker is member of the State Bar Associations for Indiana,

Ohio, and Kentucky, and has served as a volunteer on the Community Service Committee for the Young Lawyers Section of the Cincinnati Bar Association. Patrick is a member of the National Society of Professional Insurance Investigators (NSPII), Ohio Association of Civil Trial Attorneys (OACTA) as well as the Defense Trial Counsel of Indiana (DTCI).